

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

RICHARD HENRY AND JOSEPHINE HENRY

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1977, 1978 and
1979.

Petitioners, Richard Henry and Josephine Henry, 651 Hillside Avenue, North
White Plains, New York **10603**, filed a petition for redetermination of a deficiency
or for refund of personal income tax under Article 22 of the Tax Law for the
years 1977, 1978 and 1979 (File No. 45694).

A hearing was held before Allen Caplowaith, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on September 12, 1985 at 9:15 A.M., with all briefs to be submitted by
September 19, 1985. Petitioners appeared by Jack Smolen, Esq. The Audit
Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether petitioner Richard Henry's income derived from Equitable Life
Insurance Company during his nonresident periods constituted New York source
income, thus rendering such income taxable to New York.

11. Whether the deficiency asserted with respect to a capital gain derived
from the sale of petitioners' New York residence is barred by the period of
limitations on assessment.

FINDINGS OF FACT

1. Petitioners, Richard Henry and Josephine Henry, filed a 1977 New York State Income Tax Resident Return for the three (3) month period, January 1 to March 31. Although filing status "Married filing joint Return" was checked, said return was actually prepared based on the filing status "Married filing separately on ~~one~~ Return". On such return, petitioner Richard Henry's income from insurance sales was reported as employee compensation. Petitioners did not file a New York State nonresident income tax return for the balance of taxable year 1977. For 1978, they did not file a New York State personal income tax return. For 1979, petitioner Richard Henry filed a New York State Income Tax Resident Return for the period January 1 to March 29 under filing status "Single". As in 1977, his income from insurance sales was reported as employee compensation. He did not file a New York State nonresident income tax return for the balance of taxable year 1979.

2. On December 24, 1982, the Audit Division issued a Statement of Personal Income Tax Audit Changes to petitioners wherein the income earned by Richard Henry (hereafter "petitioner") from Equitable Life Insurance Company was held to be New York source income, and as such, taxable to petitioner for both his resident and nonresident periods of each year at issue. Said adjustment was made "since Equitable Life Insurance Company provides office space in New York State". Additionally, a long term capital gain derived from the sale of their New York residence was held taxable during their 1977 nonresident period. Accordingly, three (3) notices of deficiency were issued on May 25, 1983 as follows:

(a) Against petitioner for 1977 asserting additional personal income tax \$832.52, plus interest of \$428.01, for a total due of \$1,260.53.

(b) Against Josephine Henry for 1977 asserting additional personal income tax of \$240.48, plus interest of \$123.64, for a total due of \$364.12.

(c) Against petitioner for 1978 and 1979 asserting additional personal income tax of \$4,633.04, plus penalties of \$1,412.14 and interest of \$1,847.02, for a total due of \$7,892.20.

Said penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for failure to file a 1978 return and failure to pay the tax determined to be due, respectively.

3. Petitioners' reported periods of New York residence were accepted by the Audit Division.

4. Petitioner and his wife changed their residence from New York to Connecticut on April 1, 1977. They remained Connecticut residents through taxable year 1978. In early 1979 petitioner separated from his wife and moved back to New York State. He remained a New York resident for approximately three months and then moved back to Connecticut.

5. During the hearing it was stipulated that petitioner and his wife sold their New York home subsequent to their change of residence to Connecticut in 1977. However, petitioner argued that the gain derived from such sale was accruable to the 1977 resident return and the period of limitations on assessment (for such return) had expired prior to the issuance of the 1977 notices of deficiency. Accordingly, he argued that assessment on said gain is prohibited.

6. Petitioner contended that during his nonresident periods of 1977 and 1979, and for the entire year 1978, during which he was a nonresident of New York, he worked as a life insurance salesman for Equitable Life Insurance Company ("Equitable") solely from offices in Connecticut and was not attached to any New York offices. Accordingly, he argued that his returns were properly filed since he had no New York source income and that his income was derived from Connecticut.

7. Prior to the years at issue petitioner was a New York resident for approximately thirteen (13) years. During such period of New York residence he was attached to Equitable's White Plains, New York office and utilized office space there.

8. Petitioner alleged that since 1964 he had continuously maintained an office in Connecticut and he derived approximately 90 percent of his insurance sales income from such Connecticut office.

9. To support his allegation that Equitable did not provide him with office space in New York during his periods of Connecticut residence, petitioner submitted two (2) letters as follows:

(a) From Donald E. Wilson, District Manager of White Plains, New York office dated January 12, 1984, wherein it was stated that:

"Please be advised that Agent, R.F. Henry, Code #59409, was assigned to my District from 1/2/80 to 6/1/83. Prior to this period, Mr. Henry was a Connecticut resident and did business through his Connecticut office."

(b) From Thomas G. Grant, Agency Manager of White Plains, New York office dated January 12, 1984, wherein it was stated that:

"This is to confirm that Agent #59409, Richard F. Henry, was unassigned from this Agency from 4/1/77 to 1/1/80. Agent Henry was then assigned to the Wilson District on 1/2/80."

10. Petitioner submitted two (2) Equitable production statements dated August 29, 1980 and October 31, 1980 whereon Thomas G. Grant was listed as Agency Manager and Donald E. Wilson was listed as District Manager. In addition to showing "current year" production said statements also showed "previous year" production. In contrast to the letters referred to in Finding of Fact "9", said statements appear to indicate that petitioner had substantial production from the White Plains New York office during the "previous year" 1979.

11. Petitioner testified that in or about April, 1977, he changed all of

and that in 1979 he acquired a stockbroker's variable life insurance license. In support thereof he submitted a "State of Connecticut - Insurance Department, Agents License". Said license, which bore an issuance date of August 12, 1977, indicated a status of "residency". The insurance company listed on said license was Equitable at an address listed as 2 Church Street South, New Haven, Connecticut 06510. Petitioner also submitted a "State of Connecticut - Department of Business Regulation, Division of Insurance, Agent's License" indicating a nonresident status. Said license, which was issued on April 16, 1979, listed the insurance company as Equitable, at an address listed as 1285 Avenue of the Americas, New York, New York 10019. Both of the aforestated licenses appear to have been initially issued, rather than renewed, on the dates specified. Accordingly, they appear to contradict petitioner's allegation that since 1964, approximately 90 percent of his insurance sales income **was** derived from Connecticut. Although petitioner claimed that said licenses represented a change from New York to Connecticut, no evidence was submitted to show that his New York licenses had been terminated.

CONCLUSIONS OF LAW

A. That section 632(a) of the Tax Law provides, in part, that:

" - The New York adjusted gross income of a nonresident individual shall be the sum of the following:

(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources..."

B. That section 632(b) of the Tax Law provides that:

"-(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

(A) the ownership of any interest in real or tangible personal property in this state; or

(B) a business, trade, profession or occupation carried on in this state."

C. That section 689(e) of the Tax Law provides that in any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for three instances, none of which are at issue herein.

D. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that his income derived from Equitable during his nonresident periods was not derived from or connected to New York sources. Accordingly, such income is taxable to petitioner during his nonresident periods.

E. That section 654(a) of the Tax Law provides that:

" - If an individual changes his status during his taxable year from resident to nonresident, or from nonresident to resident, he shall file one return as a resident for the portion of the year during which he is a resident and one return as a nonresident for the portion of the year during which he is a nonresident..."

F. That section 654(c)(1) of the Tax Law provides, in pertinent part, that:

"If an individual changes his status from resident to nonresident, he shall, regardless of his method of accounting, accrue for the portion **of** the taxable year prior to such change of status any items of income, gain, loss or deduction accruing prior to the change of status..."

G. That section 683(c)(1)(A) of the Tax Law provides that the tax may be assessed at any time if no return is filed.

H. That the capital gain derived from petitioners' sale of their New York residence subsequent to their change of residence to Connecticut in April 1977 did not constitute an item of gain accruing prior to the change of status. Accordingly, such gain was taxable during their nonresident period in 1977. Since no return was filed for such period, the tax may be assessed at any time.

adjustments made for the nonresident period of said year, **is** not barred by the period of limitations on assessment within the meaning and intent of sections 654(a) and 683(c)(1)(A) of the Tax Law.

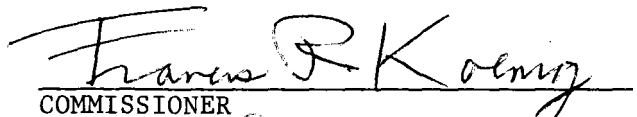
I. That the petition of Richard Henry and Josephine Henry **is** denied and the three (3) notices of deficiency issued May 25, 1983 are sustained together with such additional penalty and interest **as** may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

FLS:m


PRESIDENT


COMMISSIONER


COMMISSIONER